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No. 78-1673

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARENGO COUNTY BOARD OF EDUCATION, PETITIONER

v.

ANTHONY T. LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner, a small rural school district in Alabama, seeks review of a court of appeals decision requiring it to desegregate its five schools, three of which have student bodies that are 100% black, one of which has a student body that is predominantly white, and one of which is approximately equally divided between black and white students (Pet. App. A-64 n.2). Since the court of appeals' decision correctly implemented well-established legal principles, there is no reason for further review by this Court.

1. Although this litigation began as part of a lawsuit challenging the constitutionality of the segregated school systems throughout the State of Alabama (Pet. App. A-62),[1] in June of 1970 the three-judge court adopted a final order requiring petitioner to desegregate, and it then transferred the case to the United States District Court for the Southern District of Alabama (Pet. App. A-15). When the district court modified the order of the three-judge court to permit freedom-of-choice enrollment, the court of appeals vacated its order and remanded the case (Pet. App. A-62 to A-63). After a second appeal and remand, for the implementation of a workable desegregation plan, the district court entered an order finding that the school system had been desegregated since at least 1973 (Pet. App. A-20). The government then moved for supplemental relief, and the district court entered its current order (Pet. App. A-20). The district court found that petitioner had been " 'obdurately obstinate' " in failing to comply with previous court orders to desegregate its schools (Pet. App. A-39), and concluded (Pet. App. A-40) that "in the absence of strong and convincing court action no * * * effective desegregation shall be forthcoming." Nonetheless, the court ordered the adoption of a freedom-of-choice plan as the sole student assignment remedy, without making any finding that this

[1]See *Lee* v. *Macon County Board of Education*, 221 F. Supp. 297 (M.D. Ala. 1963).

remedy would accomplish actual desegregation, and despite the availability of alternate remedies, including zoning and pairing (Pet. App. A-43 to A-49).[2]

2. The court of appeals summarily reversed in an opinion upon which we rely (Pet. App. A-60 to A-66). The court concluded (Pet. App. A-65) that under *Green* v. *County School Board*, 391 U.S. 430 (1968), freedom of choice is a permissible desegregation remedy only when it promises to be effective. Finding that virtually no change in student attendance patterns had occurred following the implementation of the district court's freedom-of-choice plan, the court of appeals held "[i]t is clear that freedom-of-choice student assignment has not worked" in petitioner's school system (*ibid.*). Accordingly, it remanded the case to the district court to permit that court to enter an effective desegregation plan (Pet. App. A-65 to A-66).

3. In view of the foregoing, petitioner errs in suggesting (Pet. 11-14) that the court of appeals improperly substituted its judgment for that of the district court. The court of appeals correctly concluded (Pet. App. A-65 quoting *Green* v. *County School Board*, *supra*, 391 U.S.

[2]Because of its conclusion that ultimately the only feasible remedy was the construction of a single centralized school facility, the court also ordered petitioner to present a plan for such a county-wide facility including the possible sources of funding (Pet. App. A-47). The district court clearly indicated, however, that it did not intend to require petitioner—which it stated "is not a rich county and could not undertake this endeavor unaided" (Pet. App. A-46)—to construct such a facility. To the contrary, the court stated its expectation that "a central facility must ultimately be established at such time as the United States government * * * provides financial assistance to the state and county to make such construction feasible" (Pet. App. A-47).

at 440-441) that freedom of choice was not an acceptable remedy in this case because it did not offer " 'real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system.' " The district court did not find otherwise.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

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[3]There is no merit to petitioner's assertion (Pet. 14-16) that the decision below conflicts with other Fifth Circuit decisions or the decisions of other courts. Of the cases relied upon by petitioner, only *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970), involved a freedom-of-choice plan. There the court of appeals approved freedom of choice for the west bank schools of St. John the Baptist Parish, where the few white students living on the west bank had elected to attend a west bank school that was more than 70% black, and the west bank schools were separated from the east bank schools by the Mississippi River. 419 F. 2d at 1221.

There is likewise no merit to petitioner's suggestion (Pet. 6-11) that the district court's refusal to order injunctive relief other than a freedom-of-choice plan was not an appealable order under 28 U.S.C. 1292(a).